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Supreme Court, U. S.
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Supreme Court

of the

United States

1980 TERM

ALBERT L. CARRICARTE,

Petitioner

v.

THE STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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JANUARY TERM, 1980

NO.

ALBERT L. CARRICARTE,

Petitioner

v.

THE STATE OF FLORIDA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ALBERT L. CARRICARTE, prays that a Writ of Certiorari issue to review the judgment of The Supreme Court of Florida, the court of last resort in the State of Florida, entered in this cause on June 5, 1980.

CITATIONS TO OPINIONS BELOW

The opinion of The Supreme Court of Florida,

is printed in Appendix A hereto, infra, Southern Reporter, Second Series (the volume and page of which are not presently available).

JURISDICTION

The Supreme Court of Florida held that two Florida statutes which the state trial court found Petitioner to have violated, were not vague and overbroad and did not violate the First, Fifth and Fourteenth Amendments to the United States Constitution.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

Whether Section 836.05, Florida Statutes, is vague so as to violate the First, Fifth and Fourteenth Amendments to the United States Constitution.

Whether Section 836.05, Florida Statutes, is overbroad so as to violate the First, Fifth and Fourteenth Amendments to the United States Constitution.

Whether Section 877.02, Florida Statutes, is vague so as to violate the First, Fifth and Fourteenth Amendments to the United States Constitution.

Whether Section 877.02, Florida Statutes, is overbroad, so as to violate the First, Fifth and Fourteenth Amendments to the United States Constitution.

STATUTES INVOLVED

The statutes challenged herein are Sections 836.05 and 877.02, Florida Statutes. A copy of these statutes is contained in Appendix A.

STATEMENT

Petitioner was charged in a two count Information on April 13, 1978, with a violation of Section 836.05, Florida Statutes, felonious extortion, and Section 877.02, Florida Statutes, soliciting legal business. The trial court, on November 2, 1978, orally denied the motion attacking the constitutionality of these two statutes. Following the oral denial, a written Order was entered on November 6, 1978, which incorporated the statements made by the Court on November 2, 1978.

Petitioner withdrew his plea of not guilty and with the permission of the Court, entered a nolo contendre plea. In so doing, he expressly reserved the right to appeal based on the constitutional issues presented, and the Court accepted the plea with those conditions. The Respondent concurred in the plea. After the Court's inquiry of Petitioner concerning the voluntariness of the plea, the trial court accepted the plea, withheld adjudication, placed Petitioner on five years probation with the special condition that he undergo regular psychiatric treatment and, as to Count II, withheld adjudication, placed Petitioner on one year probation and required Petitioner to pay a fine of $1,000.00. The Court then stayed the execution of the fine and a portion of the probation, pending the disposition of this Appeal.

Petitioner's Motion to Dismiss directly attacked the constitutionality of these two statutes on their faces, as well as applied to the case sub judice. Respondent and the Court concurred that the constitutionality of the statutes was involved. Notice of Appeal was filed, invoking the jurisdiction of The Supreme Court of Florida, pursuant to Article 5, Section 3(d)(1) of the Florida Constitution and Rules 9.03(a)(1)(A) and 9.140(b)(1)(B), Florida Rules of Appellate Procedure.

Petitioner appealed the trial court's denial of his Motion to Dismiss the Information on the grounds of the unconstitutionality of the statutes involved, to The Supreme Court of Florida, which upheld the constitutionality of the statutes by opinion dated June 5, 1980. Appendix A.

The facts of the case are that a representative of the Coco Plum Development Company made a complaint to the State Attorney's office. A representative of the company engaged Petitioner in a conversation, which was tape recorded by the State. In the conversation, Petitioner stated, according to the prosecutor, as follows: "If you do not hire me as your lawyer and if you do not pay me a fee to be your lawyer, I will do a number of things to you, including attempting to stop your marina, go to The Miami Herald and see that articles against the project are printed and will organize and represent the people who live in the development against the construction of the marina." Mr. Carricarte was a resident of that development.

Petitioner was arrested by the Chief Investigator of the State Attorney's office and made a statement to the investigator, which was recorded.

REASONS FOR GRANTING THE WRIT

I.

WHETHER SECTION 836.05, FLORIDA STATUTES, IS VAGUE SO AS TO VIOLATE THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

WHETHER SECTION 836.05, FLORIDA STATUTES, IS OVERBROAD AS TO VIOLATE THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Florida extortion statute provides as follows:

"Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened or any other person, to do any act to refrain from doing any act against his will, shall be guilty of a felony of the second degree . . ." Section 836.05, Florida Statutes.

Petitioner contends that this statute is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Petitioner further contends that the portion of the statute relating to the injury to the property or reputation of another is so vague that its fails to constitute notice of that which is unlawful to a man of common intelligence and knowledge. The statute is so vague that it requires the jury to legislate meaning to the statute. The statute is also overbroad in its wording and scope, thereby rendering illegal, those acts which are legal, and permitting more than one prosecution for the same event in the same court.

The Florida extortion statute goes significantly beyond the garden-variety extortion statute, in that the Florida statute authorizes conviction not only where the accused has threatened to cause personal or economic harm to another person, but merely upon proof that the accused threatened "an injury to the . . . reputation of another or . . . to expose another to disgrace, or to expose any secret affecting another." The statute thereby includes in the generic types of harm, the threatening of which with malice subjects a person to prosecution and conviction thereunder, ordinary, lawful activities which millions of this country's citizens

engage in as part of their daily lives and pursuits.[1] Vague and overly broad statutes are offensive to at least three significant values of our society:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit

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[1]By the apparent terms of this statute, to threaten someone to compel the person threatened to do any act or refrain from doing any act against his will is a crime, whether or not it works to the pecuniary advantage of the defendant. So if a newspaper reporter tells a candidate that he will publish a truthful and detrimental story about the candidate unless he tells the reporter his side of it — that constitutes a crime. What of a prosecutor who is overburdened with cases, who threatens to force a defendant to trial and, if convicted, to ask for the maximum penalty, unless the defendant pleads guilty, is he violating the statute? What if a civil rights leader threatens to boycott unless city buses end segregated seating? What constitutes any pecuniary advantage whatever? What of a situation of a professor under State Board of Regent regulations, who must teach a certain number of students each year, failing to meet his quota, recognized that his position could be abolished. Would he be violating this law if he threatens a student that, unless he comes to class, the student will be failed? What of the situation if A steals money from B and B demands its return and if restitution is refused, B threatens criminal prosecution? What if he limits his demand to the amount embezzled? Is he in violation of a statute which provides that every person who extorts or gains money by means of any threat to accuse another of a crime shall be guilty of extortion?

> standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers for arbitrary and discriminatory application. Third, but related, where a vague statute 'abuts upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of those freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' than if the boundary of the forbidden area is clearly marked."

Graynad v. City of Rockford, 408 U.S. 704 (1972).

The statute before this Court clearly fails to meet any of the above-described tests. This statute makes felonious the threatening of the reputation of another or threatening to expose another to disgrace with the intent to gain any pecuniary advantage whatsoever or to compel any person to do any act against his will. Under the terms of this law, it may be a second degree felony:

1. For a lawyer to say to a prospective client, "Your opponent in this case has offered to hire me to represent him, but if you want to hire me I will represent you instead of him;"

2. For a labor organizer to say that he will notify the NLRB if the employer continues to try to prevent him from talking to an employee in order to tell him about a forthcoming union election. He expects to represent the union in that plant if it is accepted by the employees.

3. A bank sends a letter to a debtor saying that it will file a suit against the debtor, or join other creditors of the debtor, unless the debtor enters into negotiations to repay the loan.

4. A candidate for judicial position knows of a number of acts by his prospective opponent that would bring him disgrace. He wishes to spare the opponent this and tells him that, if he withdraws from the election, he will not inform the voters.

5. A union officer tells an automobile retail sales company that, unless the company either fires its employees or requires them to join the union, the union will continue to picket the company.

Would any of the persons involved in any of the scenarios above, after reading Florida Statute §836.05 and being persons of common understanding, know whether or not the act which they are to do would constitute a felony under the laws of the State of Florida and be punishable by fifteen years in the state penitentiary?

Another intolerable quality of an unconstitutionally broad statute is:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This

would, to some extent, substitute the judicial for the legislative department of government."

United States v. Reese, 92 U.S. 214 (1876).

The vice of vagueness in statutes is the unbridled discretion they give to police, prosecutors, judges and juries in determining what persons are included, or what acts are prohibited.

In its opinion, the Florida Supreme Court emphasized that although Petitioner threatened to take legal steps, e.g., give statements to the press and organize or represent parties in legal action, the additional elements of malice and intent required to convict under the statute rendered the statute constitutional. The Florida Supreme Court cited the decision of the Sixth Circuit of Appeal in *Moore v. Newell,* 401 F.Supp. 1018 (E.D.Tenn. 1975), aff'd 548 F.2d 671 (6th Cir. 1977). We reconcile the decision in *Moore v. Newell* by stating that, (1) the Sixth Circuit was more concerned with whether or not the Tennessee extortion statute violated Moore's First Amendment right of free speech, than with the question of whether or not the Tennessee statute was unconstitutionally overbroad and vague, which the Sixth Circuit resolved against Moore by simply referring to the district court's opinion, and (2) the Sixth Circuit incorrectly upheld the constitutionality of the Tennessee extortion statute by applying the elements of the statute to the actual facts in the case. We submit that the Sixth Circuit's reliance upon the facts of the particular case under its consideration in holding that the Tennessee extortion statute is not unconstitutional for vagueness and

overbreadth, is in contravention of the principle that where a defendant shows that the statute under which he is charged or has been convicted is unconstitutionally vague and overbroad, he need not demonstrate "that his own activity is constitutionally protected." *Carricarte v. Florida,* Florida Supreme Court, decided June 5, 1980, p.2; *Bigelow v. Virginia,* 421 U.S. 809 (1975).

The fact that the Florida extortion statute contains the word "malicious," as being an element of the extortion offense, does not cure the vagueness and overbreadth of the statute. As noted above, the legislature cannot, without violating the constitutional Separation of Powers Doctrine, delegate its legislative function to the other branches of government. As was said in *Screws v. U.S.,* 325 U.S. 91:

> "What the Constitution requires is a definiteness defined by the legislature, not one argumentatively spelled out for the judicial process, which precisely because it is a process, cannot avoid incompleteness. A definition which requires so much subtlety to expound is hardly definable."

Where does the prosecution derive the power to select a particular definition of malice it has selected? In addition, can the mere recitation of the word, "malice," be an adequate guide to those who would seek to follow the law? Is a wife guilty of extortion if she threatens her husband with a court suit should he fail to pay what, in her judgment, is adequate spousal support? What if A owes a debt to B and C, a nationally recognized credit bureau, asks B to comment on his estimation of A's

credit. B says to A, "unless you pay me the money you owe me, I will tell C that you are a bad credit risk." Is this extortion under the statute? Is the word "maliciously" any different than the words "corruptly" or "malpractice?"

An examination of Black's Law Dictionary shows that there are more varying definitions for the word "malice" at page 1109 than the word "malpractice" at page 1111.

It must be remembered that violation of this statute subjects the convicted violator to a maximum of fifteen years in the state penitentiary. It should also be remembered that sentences are not reviewable on appeal in the State of Florida and that the sole discretion for sentencing is in the hands of the trial judge. In *Furman v. Georgia,* 408 U.S. 239 (1972), this Court struck down the imposition of the death penalty. In *Gregg v. Georgia,* 428 U.S. 153 (1976), this Court sustained the constitutionality vel non of the death penalty. In deciding whether or not a particular penalty is cruel and unusual, there must be an element of rough proportionality between the offense and the punishment. The penalty cannot be an unusual one in the sense that it could be arbitrarily or discriminatorily applied.

The vice in the Florida extortion statute is that it is so unconstitutionally vague that such unbridled descretion is left in the hands of the prosecutor and ultimately in the single trial judge. Second, the fact that the trial judge may impose up to fifteen years sentence

for what is in many other states a misdemeanor or minor felony and the fact that a trial judge has the ability to impose a wildly excessive penalty in an arbitrary way is further vice of the Florida extortion law. While sentencing discretion may best be left to trial judges in the ordinary case, when a statute that is so impossibly vague that no man could clearly determine whether or not any possible act would be a violation of that statute, the sentencing discretion becomes unconstitutional.

This statute which is unconstitutionally vague on its face is by necessity unconstitutional when applied to the facts of the case at bar. At best, it could be said that the accused was charged with threatening to join the forces against the proposed improvement of the corporation's property. Assuming, but without conceding, such behavior should or could be punished, it should only be punished by a carefully, well-drawn and narrow statute.

II.

WHETHER SECTION 877.02, FLORIDA STATUTES, IS VAGUE SO AS TO VIOLATE THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

WHETHER SECTION 877.02, FLORIDA STATUTES IS OVERBROAD, SO AS TO VIOLATE THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Florida Statute 877.02(1) reads as follows:

> "It shall be unlawful for any person or his agent employee or any person acting on his behalf to solicit or procure through solicitation either directly or indirectly or to solicit or procure through solicitation a retainer, written or oral, any agreement authorizing an attorney to perform or render legal service, or to make it a business to solicit or procure such business retainers or agreements; provided, however . . ."

In *Bates v. State Board of Arizona,* U.S. 97 S.Ct. 2691 (1977), this Court struck down state regulations forbidding solicitation of legal business. In that case, the primary regulations referred to advertising by attorneys. This Court noted that it might justify some restrictions on some forms of personal solicitations. Then, in the cases of *In re Primus,* 435 U.S. 412,98 S.Ct. 1893 (1978) and *Ohrakik v. Ohio State Bar Assoc.,* 436 U.S. 447, 98 S.Ct. 1912 (1978), this Court had occasion to further define the areas of permissible solicitation. In the *Primus* case, a narrowly drafted set of State Bar Disciplinary Rules was held unconstitutionally vague. The appellant therein was a practicing lawyer in South Carolina and a member of the American Civil Liberties Union. He wrote a letter informing an attendee of an address he'd given that free legal assistance was available from the ACLU. He was found guilty of a violation of disciplinary rules by this Court. This Court reversed and, in so doing, approved this form of what would be solicitation under the Florida statutes.

In *Ohrakik,* an Ohio lawyer learned that parents of an eighteen year old daughter had been hospitalized following an automobile collision. He visited her twice in the hospital room. The Board found that his conduct was in violation of the state's disciplinary rules and ordered his indefinite suspension. This Court there upheld some state regulations of the lawyer's solicitation of business thro ıgh direct in-person communication.

§877.02, Florida Statutes, was declared constitutional by The Supreme Court of Florida in *State ex rel Farber v. Williams,* 183 So.2d 537 (Fla. 1966). Because this Court has approved some forms of solicition and the Florida statute vaguely bars a solicitation, either *directly or indirectly,* the statute is so broadly drawn as to be in conflict with the cases decided by this Court cited above. It must be remembered that this Court's cases dealt not with criminal prosecutions, but with state bar proceedings. The bar proceedings are civil in nature, whereas the case sub judice is a criminal prosecution, which under the statutes, provides for a one-year term in the county jail. The vagueness and overbreadth that characterize these bar regulations apply an even greater force in a criminal statute. The statute as it now stands is unconstitutionally vague, for it could conceivably make criminal those actions which this Court has ruled are constitutionally protected. Furthermore, the statute is so broad, that for the Court to attempt to narrow it to sustain its constitutionality, would place the Court in the position of the legislature. If the South Carolina Bar regulations, though much more specific that the Florida statute, are unconstitutional, it follows, therefore, that Florida Statute §877.02 must likewise fall for vagueness. The

remedy is a declaration by this Court following its guidelines and approaches in the three cases cited above, thereby leaving the matter to the legislature of the State of Florida to pass a carefully drafted act.

A careful reading of these cases shows how narrow and unclear the line is between permissible and impermissible solicitation. The Florida statutes is now clearly unconstitutional because, on its face, one cannot find clear guidance to draw this line. While this statute marginally passed muster in the *Faber* case, because of the impact of these three decisions of this Court, it is now unconstitutionally vague. Greater specificity and more exact guidelines are necessary to bring Florida into conformity with the decisions by this Court on lawyers' solicitation.

CONCLUSION

For the foregoing reasons, Petitioner requests that a Writ of Certiorari to review the judgment of The Supreme Court of Florida be granted.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida, was mailed to the State Attorney's Office, 1351 N.W. 12 Street, Miami, Florida 33125, and to Florida Attorney General's office, 401 N.W. 2 Avenue, Room 820, Miami, Florida 33132, this 28th day of July, 1980.

s/

ALAN M. MEDOF

Appendix

APPENDIX A

Florida Statute 836.05 Threats; extortion. — Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his will, shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Florida Statute 877.02 Solicitation of legal services or retainers therefor; penalty. —

(1) It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, or to make it a business to solicit or procure such business, retainers or agreements; provided, however, that nothing herein shall prohibit or be applicable to banks, trust companies, lawyer reference services, legal aid associations, lay collection agencies, railroad companies, insurance companies and agencies, and real estate companies and agencies, in the conduct of their lawful businesses, and in connection therewith and

incidental thereto forwarding legal matters to attorneys at law when such forwarding is authorized by the customers or clients of said businesses and is done pursuant to the canons of legal ethics as pronounced by the Supreme Court of Florida.

(2) It shall be unlawful for any person in the employ of or in any capacity attached to any hospital, sanitarium, police department, wrecker service or garage, prison or court, or for a person authorized to furnish bail bonds, investigators, photographers, insurance or public adjusters, to communicate directly or indirectly with any attorney or person acting on said attorney's behalf for the purpose of aiding, assisting or abetting such attorney in the solicitation of legal business or the procurement through solicitation of a retainer, written or oral, or any agreement authorizing the attorney to perform or render legal services.

(3) Any person violating any provision of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(4) This section shall be taken to be cumulative and shall not be construed to amend or repeal any other valid law, code, ordinance, rule, or penalty now in effect.

SUPREME COURT OF FLORIDA

No. 55,640

ALBERT L. CARRICARTE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

[June 5, 1980]

ADKINS, J.

The Circuit Court of the Eleventh Judicial Circuit in and for Dade County has upheld the constitutionality of sections 836.05 and 877.02, Fla. Stat. (1977). Jurisdiction vests in this Court by direct appeal pursuant to article V, section 3(b)(1), Florida Constitution (1972). The parties are referred to as they appeared in the trial court.

Acting in concert with the state attorney's office, a representative of the Cocoa Plum Development Company engaged the defendant, a resident of the development, in a recorded phone conversation. During that conversation the defendant made the following statement:

> If you do not hire me as your lawyer and if you do not pay me a fee to be your lawyer, I will do a number of things to you, including attempting to stop your marina, go to the Miami Herald and see that articles against the project are printed and will organize and represent the people who live in the development against the construction of the marina.

The defendant was charged with felonious extortion and solicitation of legal business. §§836.05 and 877.02, Fla. Stat. (1977). Upon the trial court's denial of his motions challenging the statutes' constitutionality, the defendant pled nolo contendere, expressly reserving his right to appeal. The trial court withheld adjudication on both counts and placed the defendant on five years probation for the extortion with the special condition that he undergo regular psychiatric treatment and one year probation with a $1,000 fine for the solicitation. We affirm.

The defendant challenges both statutes on the grounds of vagueness and overbreadth. U.S. Const. amend. I, V, XIV; art. I, §9, Fla. Const. His standing to attack the facial validity of the statutes under the overbreadth doctrine rests upon his contention that these statutes impermissibly affect First Amendment rights. *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). It is not necessary for him to demonstrate that his own activity is constitutionally protected. *Bigelow v. Virginia,* 421 U.S. 809 (1975).

Legislation may be overly broad if it is susceptible of application to conduct protected by the First Amendment. *Dandridge v. Williams,* 397 U.S. 471 (1970). Statutes which punish only the spoken word will withstand an overbreadth challenge only if they may be narrowly construed to delete application to protected speech. *Gooding v. Wilson,* 405 U.S. 518 (1972). Since each of the statutes in this case proscribes purely verbal communication, we must determine whether and to what extent they apply to speech falling within the ambit of the First Amendment. Constitutional

immunity from regulation does not necessarily extend to any and all utterances without reference to their effect or the context in which they appear. *S.H.B. v State,* 355 So.2d 1176 (Fla. 1977).

The extortion statute prohibits only those utterances or communications which constitute malicious threats to do injury to another's person, reputation, or property. Furthermore, the threats must be made with the intent to extort money or the intent to compel another to act or refrain from acting against his will. §836.05, Fla. Stat. (1977). *See State v. McInnes,* 153 So.2d 854 (Fla. 1st DCA 1963). These are significant limitations which direct the statutory prohibition to communications undeserving of First Amendment protection. The state's interest in shielding its citizens from these types of strong-arm tactics can only be designated as compelling. To hold otherwise would transform the First Amendment into an instrument of leverage for the influential. *See Harris v. Beneficial Finance Co.,* 338 So.2d 196 (Fla. 1976).

In *Matthews v. State,* 363 So.2d 1066 (Fla. 1978), the defendant led other demonstrators in a chant which urged the assassination of the local sheriff. He was convicted of maliciously threatening injury to another's person in violation of this section. This Court affirmed the conviction in the face of challenges similar to those raised herein. The Court held that the district court had correctly found that Matthews' chanting constituted a real and substantial threat as opposed to mere political hyperbole. *Watts v. United States,* 394 U.S. 705 (1969); *see State v. McInnes.* Carricarte attempts to distinguish *Matthews* by arguing that there the threat was to do an illegal act, *i.e.,* murder, whereas here the defendant

threatened to take legal steps, *e.g.*, give statements to the press and organize or represent parties in legal actions. This argument fails to recognize the additional elements of malice and intent required to convict under the statute. In *Moore v. Newell,* 401 F.Supp 1018 (E.D. Ten. 1975), *aff'd* 548 F.2d 671 (6th Cir. 1977), the defendant, a Black Panther leader, sought contributions for various charities in the black community from the manager of a supermarket in a predominantly black neighborhood. When the manager refused, the defendant and others picketed the store for several hours without violence or actually blocking the entrance. Moore was convicted under the Tennessee extortion statute which closely resembles our own. *See* §39-4301, Tenn. Code Annot. (1973). The federal district court noted that the defendant was not convicted for engaging in the constitutionally protected activity of picketing "but for threatening to picket for the purpose of extorting a payment." 401 F.Supp. at 1021. In affirming, the Sixth Circuit reiterated that the worthiness of the charitable cause in no way justified the use of picketing to coerce a contribution from an unwilling merchant. 548 F.2d at 673. In the same vein, we cannot sanction the use of threats to take legal action where those threats are made maliciously and with the intent to acquire pecuniary gain.

Defendant's contention that the extortion statute is impermissibly vague by virtue of the term "malicious" is without merit. This Court has repeatedly upheld the terms "malice" and "malicious" against a vagueness challenge. *See, e.g., State v. Gaylord,* 356 So.2d 313 (Fla. 1978); *Faust v. State,* 354 So.2d 866 (Fla. 1978); *Jordan v. State,* 334 So.2d 589 (Fla. 1976). Just as the elements of malice and intent prevent overbroad

application of the statute, they lend sufficient clarity to provide adequate notice of the proscribed activity to persons of ordinary intelligence and understanding. We hold that section 836.05, Florida Statutes (1977), is constitutional.

The lawyer anti-solicitation statute was upheld in *State ex rel. Farber v. Williams,* 183 So.2d 537 (Fla. 1966), and more recently in *Pace v. State,* 368 So.2d 340 (Fla. 1979). In *Pace* this Court analyzed the statute in light of pertinent intervening decisions of the United States Supreme Court. *See Ohralick v. Ohio State Bar Association,* 436 U.S. 447 (1978); *In Re Primus,* 436 U.S. 412 (1978); and *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). There have been no subsequent decisions to persuade us to revisit *Pace.* Indeed, we specifically refrained from condoning direct personal solicitation in our authorization of certain forms of advertising. *The Florida Bar Re: Amendment to The Florida Bar Code of Professional Responsibility,* 380 So.2d 435 (Fla. 1980).

The order of the trial court is affirmed.

It is so ordered.

ENGLAND, C.J., BOYD, OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Dade County,

Wilkie D. Ferguson, Jr., Judge — Case No. 78-5131

Stephen J. Kogan, Miami, Florida,
for Appellant

Jim Smith, Attorney General, and Steven L. Bolotin, Assistant Attorney General, Miami, Florida,
for Appellee

APPENDIX B

Tennessee Statute 39-4301 Threats for purpose of extortion or obtaining action — Penalty. — "If any person, either verbally or by written or printed communication maliciously threaten to accuse another of a crime, offense, or immoral act, or to do any injury to the person, reputation or property of another, with intent thereby to extort any money, property, or pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall, on conviction, be punished by imprisonment in the penitentary not less than two (2) years nor more than five (5) years.